

¹ The Order Denying Medical Treatment contains a typographical error dating the decision the 20th day of February 2002 rather than 2003.

days. In the alternative, claimant argues there was just cause for her failure to notify respondent because she was afraid she would lose her job if she reported an accident. And claimant notes the Kansas Division of Workers Compensation form K-WC40 states a claim may be denied for failure to advise the employer within 10 days. Claimant argues the use of the term “may” on this form is misleading.

The respondent argues that even though claimant was terminated on April 23, 2002, her last day worked was April 9, 2002, and notification of the alleged accidents on May 6, 2002, was well beyond the 10-day notice requirement. Respondent further argues claimant has not established just cause for her failure to report the accidents within 10 days. Respondent argues claimant’s assertion she did not report the accidents because she was afraid she would be terminated is not supported by the evidence.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Roberta D. Darcy began working as a certified nurse’s aide for respondent in August 2001. Her job duties included assisting and giving residents baths, getting the individuals up for breakfast and taking care of their physical needs.

Before the onset of claimant’s back pain in March 2002, claimant had sought treatment with Dr. Ghassan Salman in the summer of 2001 for leg pain. Dr. Salman ordered an MRI of claimant’s low back in August 2001. Dr. Salman found claimant had disk disease. Claimant continued to see Dr. Salman with regard to leg pain while she was still working.

Sometime in March 2002, while helping a nurse to transfer a resident from a chair to the bed claimant stated that she felt immediate pain like someone had snapped a pencil in her back. She knew then that she had hurt her back. But she didn’t say anything at that time. Claimant continued to work her shift and then took some Tylenol for the pain when she got home.

She reported to work the next day and wore her back belt. Respondent had provided claimant a back belt and she also had one from a prior injury she had suffered to her low back. Claimant testified she continued to perform the same job duties but her back pain persisted and was worsened by lifting patients.

Claimant sought treatment with Dr. Salman at Greensburg Family Practice in Greensburg, Kansas. Dr. Salman’s office note of March 28, 2002, contains claimant’s complaint of ongoing pain in her left thigh. There is no mention of a work-related incident or back complaints at that doctor’s appointment.

The last day the claimant worked was April 9, 2002. And on April 11, 2002, when claimant saw Dr. Salman she did not fill out any paperwork at the doctor's office indicating she had a work-related injury even though she then had back complaints. The doctor took her off work and claimant continued to see the doctor. Claimant called and told respondent she would not be in to work because of some back problems. She did not tell respondent her back problems were work related. Claimant testified she didn't tell anyone for fear of losing her job. Claimant also testified she wasn't aware of the 10-day notice requirement under the law.

The claimant's off work slip indicated she was released to return to work on April 15, 2002. But claimant did not return to work even though she was scheduled to work. Between April 15, 2002, and April 19, 2002, claimant did not have a doctor's note to indicate that she should be off work. Consequently, claimant was terminated for excessive absenteeism.

When claimant had called respondent's bookkeeper to advise her she would not be in to work she was asked if her back condition was work related. Claimant denied her back problem was work related.

Claimant saw Dr. Salman again on April 19, 2002, and the doctor gave claimant a note indicating that she shouldn't work until April 25, 2002, because of her back. But when claimant went to pick up her check on April 23, 2002, she was directed to a meeting and was told that she was terminated due to absenteeism. During the meeting, claimant never said that she had hurt her back at work.

Claimant agreed she had three or four prior work-related back injuries while working for other employers and had completed accident report forms in order to receive medical treatment for those injuries. Claimant agreed that when she started her employment with respondent she received orientation regarding work accidents and was advised to report any accident right away and fill out an accident form.

On May 6, 2002, claimant's attorney, by letter to the respondent, requested medical treatment for claimant's back injury.

The Workers Compensation Act requires workers to give notice of their accidental injury within 10 days of when it occurs. But that 10-day period may be extended to 75 days if the worker has just cause for failing to notify the employer within the initial 10-day period following the accident. Further, the employer's actual knowledge of the accident renders the giving of such notice unnecessary.²

² See K.S.A. 44-520.

The requirement to provide notice of accident within 10 days becomes somewhat confusing when dealing with microtrauma situations where accidents may occur over an extended period of time. It is undisputed claimant did not notify respondent of an accident until her attorney sent respondent a letter dated May 6, 2002.

The Kansas Supreme Court, in *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999), reaffirmed the earlier findings in *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994), that an appropriate date of accident to be utilized in microtrauma cases is the last day of work. While it is acknowledged *Treaster* dealt primarily with carpal tunnel syndrome, rather than a back condition as found here, it nevertheless applies to microtrauma injuries which occur over long periods of time, regardless of the body part involved.

In this case, it is undisputed claimant's last day worked was April 9, 2002. The letter from claimant's attorney to respondent, which indicated claimant was alleging a series of accidents, was dated May 6, 2002. Because the date of accident would be April 9, 2002, for the alleged series of accidents, this notice would be beyond the 10-day statutory notice requirement.

But the notice would be within 75 days if claimant had just cause for failure to notify the respondent. Claimant argues that she was afraid that if she notified respondent that she had suffered a work-related injury she would be fired. But no further evidence is offered to support or substantiate her allegation.

It is significant that on March 28, 2002, when claimant went to the doctor, she failed to mention that her symptoms stemmed from a work-related accident and she did not describe the incident lifting the patient. It is equally significant claimant failed to complain that work was causing her pain as she continued to seek treatment through April 2002 when she was terminated from employment. It is difficult to conclude claimant could suffer an injury in March 2002, and neither mention this when she went to the doctor nor mention ongoing workplace aggravations as she continued to receive treatment.

Although claimant denied that she knew she had to report a work-related accident within 10 days, the Board finds the record establishes claimant, at least, should have known that requirement. Claimant had experienced previous workers compensation accidents and had made claims for medical treatment for those accidents. And claimant was told at orientation that she was to immediately report work-related accidents. The Board finds that claimant's just cause argument fails.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Pamela J. Fuller dated February 20, 2003, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of April 2003.

BOARD MEMBER

c: Terry J. Malone, Attorney for Claimant
William L. Townsley, Attorney for Respondent
Pamela J. Fuller, Administrative Law Judge
Director, Division of Workers Compensation